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SUPREME COURT
STATE OF WASHINGTON
Apr 25, 2011, 12:50 pm
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NO. 84739-8

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

BOBBY R. THOMPSON,

Respondent.

PETITIONER'S RESPONSE
TO BRIEF OF AMICI CURIAE

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ORIGINAL

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I. BACKGROUND

The Court has granted permission to Innocence Network and Washington Association of Criminal Defense Lawyers to file a brief as amici curiae. This brief is the State's response.

II. SUPPLEMENTAL ARGUMENT

DNA TESTING IS UNWARRANTED IN LIGHT OF ALL THE CIRCUMSTANCES OF THIS CASE, INCLUDING THE DEFENDANT'S UNREPUDIATED ADMISSION TO HAVING SEXUAL INTERCOURSE WITH THE VICTIM.

This court has granted review limited to the following issue: "whether the trial court, in determining whether to grant the defendant's motion for postconviction DNA testing, properly considered evidence available to the State at the time of trial but not presented at trial." The brief of amici curiae does not discuss this issue. The brief does, however, have some relevance to the ultimate issue of whether, if Thompson's statement is considered, DNA testing should be ordered. This court has discretion to either decide that ultimate issue or remand the case to the Court of Appeals for a decision. RAP 13.7(d). Since the State is asking this court to determine the disposition of this case, some discussion of the amicus brief is warranted.

The brief attacks a straw man. Amici ask this court to hold that "a confession does not establish guilt conclusively." Brief of

Amici Curiae at 20. The State has never argued that it does. It depends on the circumstances of the confession and the other facts of the case – none of which are discussed by amici.

Nor have amici demonstrated that false confessions are common, or that juries are generally incapable of distinguishing between false and true confessions. As of 2006, over 20,000 offenders a year were being convicted of rape and murder in state courts in the United States. U.S. Dept. of Justice, Bureau of Justice Statistics, Felony Sentences in State Courts, 2006 – Statistical Tables, table 1.1.¹ From cases covering more than 30 years, amici have documented 252 post-conviction exonerations. Brief of Amici Curiae at 7. Each of these cases is a tragedy. Nonetheless, the cases represent a tiny fraction of the hundreds of thousands of convictions that occurred during the 30-year period. Of this small proportion of exonerations, less than 18% (45 of 252) involved false confessions to rape or murder. It is obviously very difficult to estimate accurately how often juries mistakenly convict on the basis

¹ The website of the Bureau of Justice Statistics sets out biennial reports of felony sentences in state courts from 1992 through 2006 (<http://bjs.ojp.usdoj.gov/index.cfm?ty=pbse&sid=28>).

of false confessions. Amici shed little light on the frequency of this occurrence, but their statistics suggest that it is extremely rare.

As previously pointed out by the State, the Washington Legislature has not provided for DNA testing in any case where there is a *possibility* of innocence. "Supplemental Brief of Respondent"² at 5-6. Rather, testing is only available if "the convicted person has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." RCW 10.73.170(3). This was intended to limit testing to "cases where there is a credible showing that it likely could benefit an innocent person." House Bill Report on HB 2872 at 3 (2004). Given the numerous conflicting demands on public resources, the Legislature was unwilling to impose on the State Patrol the cost of providing testing every time that a convicted person claims innocence.

Ultimately, the State agrees with this statement made by amici:

² The supplemental brief filed in this court by the State was erroneously labeled "Supplemental Brief of Respondent," when it should have been "Petitioner."

To be sure, confessions constitute important – and persuasive – evidence. But their very persuasiveness compels careful attention to their veracity.

Brief of Amici Curiae at 1.³ This precisely frames the question that this court should ask: has Thompson carried his burden of demonstrating that his admission to having sexual intercourse with the victim lacked veracity?

Most of the examples of false confessions that amici cite involve lengthy or coercive interrogations. Many of them involve juveniles or persons with mental disabilities. None of these circumstances have been shown to exist in the present case. When Thompson was questioned by police, he was 41 years old. 2 CP 129. There is no indication that he suffers from any mental health problems. His 14 prior felony convictions demonstrate his familiarity with the criminal justice system. 2 CP 130, 137. Nor has he put forward any evidence that police questioning was lengthy or coercive. Indeed, he has *never* repudiated his statement. It is

³ The State also agrees that Thompson's statement was not a "confession." A confession is a statement that acknowledges the person's guilt of the crime charged. State v. Turner, 58 Wn.2d 159, 160, 361 P.2d 581 (1961). In Thompson's statement, he admitted sexual intercourse with the victim, but he claimed that it was consensual. 1 CP 75-76. He thus denied that he was guilty of rape.

entirely consistent with his current unsworn assertion that he is "innocent of this heinous crime." 1 CP 91.


The State does not deny that false confessions and false inculpatory statements sometimes occur. There is, however, no reason to believe that, in this case, Thompson's admission to sexual intercourse was false. Nor has he put forward any explanation of the overwhelming circumstantial evidence that proved his guilt. He has denied that the intercourse constituted rape, but DNA testing cannot shed any light on that question. On consideration of all the evidence, including Thompson's statement, this court should determine that Thompson has failed to satisfy the standard set out in RCW 10.73.170(3).

III. CONCLUSION

The order denying DNA testing should be affirmed.

Respectfully submitted on April 25, 2011.

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